STATE OF MICHIGAN

COURT OF APPEALS

RONALD DeMAAGD,

Plaintiff-Appellant,

v

CITY OF SOUTHFIELD,

Defendant-Appellee.

UNPUBLISHED
August 10, 2006

No. 267291
Oakland Circuit Court
LC No. 2004-060091-CL

Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendant. We affirm. Plaintiff was employed by defendant as Deputy City Administrator from 1989 until 2004. This case arises out of plaintiff's termination. Plaintiff alleges that his termination was causally connected to reports he made that defendant might violate its own City Charter by hiring Dale Iman as City Administrator, in violation of the Whistleblowers' Protection Act (WPA), MCL 15.362 *et seq*. Plaintiff also alleges that the City Charter precludes defendant from terminating him without just cause. The trial court granted defendant's motion for summary disposition, and plaintiff appealed.

In 1989, defendant's City Administrator at the time, Robert Block, recruited plaintiff for the position of Deputy City Administrator. No such position existed at the time, so Block submitted plaintiff's appointment to the City Council, which passed a resolution hiring plaintiff for the position. Plaintiff did not go through any of the processes required by the City Charter to become a part of the Civil Service. By 1998, plaintiff's relationship with Block had broken down, but the City Council did not renew Block's contract, and Donald Gross became City Administrator in 1999. Plaintiff continued serving as Deputy City Administrator "without discussion." In the November 2003 general election, the people of the City of Southfield voted to amend the City Charter to formally provide that the City Administrator could appoint a Deputy City Administrator. Plaintiff again simply continued working as he had been, and no actions were taken by anyone regarding his position.

Plaintiff apparently executed his job responsibilities satisfactorily for some time, but members of the city administration began having concerns with him. In 2000, the City Council asked Gross to keep plaintiff from attending City Council meetings because he was disruptive and inappropriate. A number of individuals, including council members, Gross, and city attorney John Beras personally observed and received complaints regarding instances of

impropriety by plaintiff. These ranged from belittling or insulting behavior to his general demeanor to actual physical confrontations. Several opined that plaintiff had become "a different person." On August 22, 2003, plaintiff left a voicemail message listing a variety of improprieties he had known about for "too long" and threatening to become a whistleblower, a threat he did not follow through on. Gross became sufficiently concerned about plaintiff to ask plaintiff to take a two-week leave of absence. Plaintiff took that leave of absence.

In 2004, defendant retained PAR Group as an independent consultant to help find a new City Administrator. After some research, PAR Group provided defendant's City Council with a list, which the City Council eventually pared down to Dale Iman as its finalist. However, for reasons that were, and apparently remain, unknown to anyone, a number of newspaper clippings then surfaced "all over the city" pertaining to allegations of Iman's past legal problems involving his stepson. These clippings generated widespread concern. Plaintiff took a number of the clippings and forwarded them to various members of the city administration. All of the deposition testimony from the recipients of these articles indicates that plaintiff never told them why he was forwarding the articles to them. Ultimately, defendant decided that the legal problems described in the articles were irrelevant, and Dale Iman became the new City Administrator. Several members of the city administration met with Iman to discuss plaintiff, and over the course of his interviewing, Iman had other individual discussions with administration members concerning plaintiff. Iman wrote plaintiff a letter offering plaintiff the opportunity to resign, which plaintiff did not take. Iman terminated plaintiff on July 1, 2004.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*., 119. When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact, although "the mere possibility that the claim might be supported by evidence produced at trial" is insufficient. *Id*., 120-121. Because the trial court considered evidence beyond just the pleadings, MCR 2.116(C)(8) is not applicable. *Id*., 119-120.

Plaintiff first argues that the trial court improperly used judicial notice to reach a conclusion about a disputed material fact. We disagree. "Under MRE 201(b), a 'judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Meyerhoff v Turner Const Co*, 210 Mich App 491, 494; 534 NW2d 204 ((1995), aff'd in relevant part and vac'd on other grounds 456 Mich 933 (1998). Plaintiff alleges that the trial court judicially noticed that defendant conducted an adequate background check of Iman. However, the trial court stated that "*even* the Chief of Police" found the background checks "*in*adequate." (Emphasis added.) Further, even if the trial court judicially noticed that defendant conducted an adequate background check, we do not understand how this prejudiced plaintiff's claims under the WPA or the City Charter. A party may not leave it to this Court to search for a factual or

legal basis for that party's claims. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004); *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Plaintiff next argues that the trial court erred in concluding that he was not engaged in a "protected activity" under the WPA. We disagree. "To establish a prima facie case under [the Whistleblowers' Protection Act], a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." MCL 15.362; *West v General Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003). "Whether a plaintiff has established a prima facie case under the WPA is a question of law subject to review de novo." *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004). "An employee is engaged in protected activity under the Whistleblowers' Protection Act who has reported, or is about to report, a *suspected* violation of law to a public body." MCL 15.362; *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 610; 566 NW2d 571 (1997) (emphasis added).

The parties do not dispute the underlying basis for plaintiff's argument: if Iman had been convicted of a felony, the City Charter would have barred defendant from hiring him. Furthermore, the parties do not appear to dispute that Iman was not, in fact, actually ever convicted of a felony. Therefore, the gravamen of plaintiff's argument is that he was engaged in a protected activity under the WPA because he reported a suspected violation of the law and did not know that the suspicion was untrue. Defendant raised two objections to this: first, that plaintiff's suspicion was not reasonable, and second, that plaintiff did not actually "report" anything.

Plaintiff argues correctly that MCL 15.362 does not contain an explicit reasonableness requirement, but rather clearly states that the only potentially applicable exception is "unless the employee knows that the report is false." Defendant relies on Michigan Civil Jury Instruction 107.04, which states:

> Plaintiff must reasonably believe that a violation of law or a regulation has occurred. It is not necessary that an actual violation of law or a regulation has occurred, but the employee can not have a reasonable belief if [he] knows [his] report is false.

Plaintiff argues that M Civ JI 107.04 should not be given if it is an inaccurate statement of law. See *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 330-333; 683 NW2d 573 (2004). We agree.

However, our Supreme Court has observed that "Many courts have held that a plaintiff is precluded from recovering under a whistleblower statute when the employee acts in bad faith." *Shallal, supra* at 621. The underlying purpose of the WPA is to protect the public "by removing barriers that may interdict employee efforts to report violations or suspected violations of the law." *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378-379; 563 NW2d 23 (1997). Although this purpose can only be served by granting whistleblowers considerable benefit of the doubt, it does not seem that this purpose would be served by permitting them to act with reckless abandon justified by a technical lack of awareness that their reports were untrue. Such an approach could, for example, tend to encourage employees to remain *deliberately*

unaware of the truth. Therefore, M Civ JI 107.04 is the only practical way to serve the goals of the WPA. A whistleblower plaintiff cannot make a wholly unfounded or unreasonable assertion that there has been or will be a violation of the law without running afoul of the WPA's underlying good faith requirement.

We decline to decide whether plaintiff's belief was reasonable because of the related question whether plaintiff actually "reported" anything at all within the WPA's definition. The WPA requires that an employee "report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body." MCL 15.362. Plaintiff correctly asserts that the applicable "violation of a law" here is a violation of defendant's City Charter that would have occurred if defendant had hired a convicted felon. Therefore, plaintiff argues that "whatever general public knowledge may have existed about Mr. Iman's problems with the law in the communities where he formerly resided, it was plaintiff who put two and two together and *pointed out that the city charter was at issue*" (emphasis added). However, we have carefully reviewed all of the deposition testimony included in the lower court record, and we conclude that the record simply fails to support plaintiff's assertion.

Plaintiff admits that the newspaper clippings themselves were already "all over the city." All he did was take some of them and pass them on to other members of the city administration. Plaintiff's own deposition does not contain any indication that he told anyone, verbally or in writing, of his concern that it would violate the City Charter if Iman had been convicted of a felony and was hired. Rather, plaintiff discussed Iman's attitude toward unions with some of the people. Plaintiff may have discussed the charter provision regarding felony convictions with the city attorney in reference to *a different candidate*, but his testimony on that point is ambiguous. The city attorney testified that he was unable to speculate as to why plaintiff gave him the articles, because plaintiff "simply dropped them off," but he felt plaintiff was simply trying to derail the hiring process. All the other deponents testified that plaintiff did not tell them why he was giving them the articles, that they had no discussions with plaintiff at all regarding Iman, or that they were not even aware that plaintiff was involved. In sum, there is no evidence whatsoever in the record that plaintiff actually reported an impending potential violation of the City Charter. Therefore, the trial court properly found that plaintiff could not establish an essential element of a prima facie WPA claim.

It is therefore not necessary for us to address the other arguments plaintiff raises in support of his WPA claim. We note, however, that the record is replete with indications that plaintiff's behavior was gravely troubling to a number of city administration members, who were already discussing plaintiff's termination before Iman's legal troubles became an issue, but they felt that there was nothing they could or should do until a new City Administrator was retained. We also note that we are unconvinced that one angry voicemail message a year previously is sufficient to establish, at a summary disposition stage, that any of plaintiff's actions in this matter were in bad faith. However, we do not now decide these matters.

Plaintiff's final argument is that, by operation of the City Charter, his position was protected from termination except for just cause. Under the circumstances, we disagree. We review de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175, amended on other grounds 468 Mich 1216 (2003). Interpretation of a city charter is

treated as an issue of statutory interpretation. *Livonia Hotel, LLC v City of Livonia*, 259 Mich App 116, 131; 673 NW2d 763 (2003).

Under defendant's City Charter, "The civil service of the city shall be divided into unclassified and classified service." Plaintiff argues that the position of Deputy City Administrator is not included in the specifically enumerated "unclassified" positions, so it must be "classified." The City Charter further provides that "Any employee or officer in the classified civil service" may only be removed for just cause. This is a reasonable argument. However, plaintiff admits that he was not hired pursuant to the City Charter, he was hired pursuant to a City Council resolution, and he never went through the process – required by the City Charter – to become a member of the civil service. Therefore, he could not have been a member of the civil service at all, whether in a classified or unclassified position. His employment was purely a creature of the City Council's resolution. After the 2003 amendment to the City Charter, which formally added a Deputy City Administrator position, no steps were taken to reconcile or convert plaintiff from his original position to the Charter position. Plaintiff was not employed under the City Charter, so he cannot be protected under the City Charter.

The trial court properly found that plaintiff did not make a protected "report" under the WPA, and he was not a "classified employee" under the City Charter. Therefore, we perceive no need to address any of the other issues raised.

Affirmed.

/s/ Alton T. Davis
/s/ Jessica R. Cooper
/s/ Stephen L. Borrello